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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GULF OIL CORPORATION

and

GULF MINERALS CANADA LIMITED

PETITION FOR A WRIT OF MANDAMUS TO THE HONORABLE PRENTICE H. MARSHALL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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QUESTIONS PRESENTED

Under the constitutional doctrine of act of state, as well as the principles of sovereign compulsion and international comity, all of which restrict the exercise of subject matter jurisdiction by a federal court where the foreign affairs of the United States are affected:

(A) May a federal district court take jurisdiction to apply the Sherman Antitrust Act to foreign countries' regulation of their vital natural resources?

(B) May it do so over the official protests of those nations and in complete disregard of their official representations of their own laws and policies?

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Petitioners, Gulf Oil Corporation ("Gulf")[1] and Gulf Minerals Canada Limited ("Gulf Canada"),[2] respectfully pray that a writ of mandamus issue from this Court directed to respondent, the Honorable Prentice H. Marshall, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, requiring respondent to vacate his decision and order of December 17, 1980 denying petitioners' motion for summary judgment in *In re Tennessee Valley Authority Uranium An-*

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[1] In accordance with Rule 28.1, Gulf's subsidiaries and affiliates are listed in the Subsidiary and Affiliate Appendix to this petition.

[2] Gulf Canada, a wholly-owned subsidiary of Gulf, is organized and duly incorporated under the laws of Canada, with its principal place of business in Toronto, Ontario, Canada.

titrust Litigation, No. 342-A (N.D. Ill., filed Nov. 18, 1977),[3] and requiring him to grant that motion.

OPINIONS BELOW

Respondents' order denying petitioners' motion for summary judgment was issued in an oral ruling from the bench at a pretrial conference on December 17, 1980, and was then entered in a pretrial order of January 9, 1981. The relevant portion of the transcript of the pretrial conference is reproduced as Appendix A and the pretrial order is reproduced as Appendix B.[4] No written opinion was issued though the motion for summary judgment had been extensively briefed and argued and had been under submission for more than six months.

JURISDICTION

The order of the United States District Court for the Northern District of Illinois, Eastern Division, denying petitioners' motion for summary judgment was entered

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[3] This case is a consolidation of three lawsuits brought by the Tennessee Valley Authority ("TVA"): *Tennessee Valley Authority* v. *Rio Algom Corp.*, No. 77-1053 (D. Colo., filed Nov. 18, 1977), *Tennessee Valley Authority* v. *Rio Algom Limited*, No. 1-77-290 (E.D. Tenn., filed Nov. 18, 1977), and *Tennessee Valley Authority* v. *Urangesellschaft mbH & Co.*, No. 77-Civ. 5617 (S.D.N.Y., filed Nov. 18, 1977).

By Order of July 31, 1978, the Judicial Panel on Multidistrict Litigation transferred these three cases to the Northern District of Illinois for consolidated pretrial proceedings with the *Westinghouse* case. *In re Uranium Industry Antitrust Litigation*, 458 F. Supp. 1223 (J.P.M.D.L. 1978).

Other than petitioners, defendants named in the proceeding below are: Rio Algom Limited, Rio Tinto Zinc Corporation Limited, R.T.Z. Services Limited, Uranerz Canada Limited, Noranda Mines Limited, Denison Mines Limited, Urangesellschaft mbH & Co., Uranex, Nuclear Fuels Corporation of South Africa Ltd., Engelhard Minerals & Chemicals Corporation, and Rio Algom Corporation.

[4] References to the separately bound Appendix accompanying this petition will be cited, *e.g.* (App. A 2a).

on December 17, 1980. In a subsequent oral ruling from the bench at a pretrial conference on January 29, 1981, the court denied petitioners' motion, made under 28 U.S.C. § 1292(b), that it certify an interlocutory appeal of its ruling denying summary judgment. This denial was then entered in a pretrial order of February 13, 1981. The relevant portion of the transcript of the pretrial conference at which certification was denied is reproduced as Appendix C and the pretrial order is reproduced as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are involved in this case: Article I, Section 8, Clause 3; Article II, Section 2, Clause 2.

The following regulations are involved in this case: the Canadian Uranium Information Security Regulations § 3, SOR/76-644, as amended by SOR/77-836.

The foregoing provisions of law are set forth in the Constitutional and Statutory Appendix to this petition.

STATEMENT OF THE CASE

Introduction

This is a related case to *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360 (Oct. Term 1980), in which a Jurisdictional Statement has been filed with this Court. As in that case, the central issue here is the jurisdiction of an American court to judge the legality of the laws and policies of foreign nations.

The district court here proposes that a trial be held at which the jury will be instructed to apply the Sherman Act to a uranium marketing arrangement established and operated as a governmental regulatory action by the

governments of Canada, France, South Africa and Australia. This foreign government marketing arrangement or "cartel" set export prices, quotas, and terms of sale for foreign uranium from 1972 to 1975. The foreign governments required all uranium producers in their respective nations to participate in the "cartel" and to abide by its decisions. In briefs filed with the district court as official governmental representations, the four foreign governments have set forth all these facts and strenuously protested the court's assumption of jurisdiction to apply American antitrust law to their regulatory actions.

Petitioners moved for summary judgment to prevent the legality of actions required by foreign governments on their own soil from being adjudged under American antitrust law. On December 17, 1980, the court below denied petitioners' motion. The court ignored entirely the foreign governments' official representations, and asserted that no act of state issue was presented by the foreign nations' regulatory actions and laws.[5] The court said: "[W]e are not concerned here with a question of Act of State. We are concerned rather with a defense of state compulsion. That defense raises questions of fact. . . . That defense will be submitted here under appropriate instructions to the jury, if there is evidence sufficient to submit that issue to the jury." (App. A 2a.)

In ruling that regulations and laws of foreign nations do not constitute acts of state, the district court made a flat mistake of law. The court compounded this mistake by wholly disregarding the foreign governments' representations concerning the requirements of their own laws and regulations, and by ruling that the question of what those laws and regulations required is to be put

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[5] The only possible exception to this assertion was the court's statement that the act of state doctrine might be relevant to defendant Uranex though it allegedly is irrelevant to any other defendant.

to the jury "if there is [sufficient] evidence." This ruling maximizes the offense to the foreign governments. In contravention of a basic premise of the act of state doctrine—that the actions and credibility of a foreign sovereign should not be questioned or ignored by American courts—official representations of foreign sovereigns will either be judicially treated as insufficient even to raise a jury issue, or will be submitted to a jury for a determination of their truthfulness or mendacity.

Petitioners ask this Court to issue a writ of mandamus directing respondent to cease his course of action, which is being pursued in contravention of constitutional doctrines restricting the exercise of jurisdiction in the pending matter. Respondent has refused to limit his jurisdiction in accordance with these constitutional doctrines and, by measures he has taken, has stepped into the center of and aggravated a longstanding dispute between the United States and some of its closest allies.[6] By thus exceeding his power, respondent has made it necessary for petitioners to seek an extraordinary writ to restrain illegal judicial action which is harming foreign relations and injuring petitioners.

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[6] That inquiry into the cartel has enmeshed the district court in the foreign affairs of the United States is plain. Foreign nations have addressed no less than thirty-seven diplomatic communications to the United States regarding their governmental cartel, the unacceptability of American judicial inquiry into that cartel, and an American governmental embargo against foreign uranium which led to the cartel. Nineteen additional communications from foreign governments have been addressed directly to the American courts which are attempting to "try" the governmental cartel. Four foreign governments have enacted legislation to preclude judicial inquiry into the cartel. And two nations (Australia and the United Kingdom), reacting to suits against the cartel, have enacted legislation designed to prevent enforcement of any American antitrust judgments, while a third nation (Canada) has such legislation under consideration.

A. The Commercial Background of TVA's Lawsuit

This lawsuit involves an effort by the Tennessee Valley Authority ("TVA") to recover damages, from alleged "cartelists," for a claimed boycott and for injuries assertedly suffered on three contracts entered into by TVA.

TVA operates the nation's largest electric power system, using both nuclear and non-nuclear generating systems. In 1973 TVA issued invitations to suppliers to bid for sales of uranium. The bids it received did not meet the terms it demanded. After TVA modified its terms, in 1974 it entered contracts for the receipt of uranium from Rio Algom Limited ("Rio Algom") and Uranerz Canada Limited ("Uranerz"), both of which are Canadian corporations, and from Homestake Mining Company ("Homestake"), a domestic company. Homestake was to fulfill its supply obligation with uranium it would obtain from Uranex, which is an arm of the government of France. The three contracts together called for the delivery of just over 21 million pounds of uranium between 1976 and 1990. Two of these contracts were later modified or abrogated by the foreign governments involved.

In 1975, the Canadian Atomic Energy Control Board ("AECB"), which supervises and controls all aspects of the Canadian uranium industry, including the terms of all export contracts, rejected the price agreed upon by TVA and Uranerz as being too low and therefore not in Canada's best interest. TVA and Uranerz renegotiated their contract with Canadian government guidance, and this revised contract was approved by the AECB. The AECB later told TVA that the contract would be subject to further review, with the possibility that even the revised price might later be adjusted upwards.

The TVA contract with Homestake was a "pass-through" arrangement, since Homestake was to provide TVA with uranium received from Uranex. In 1975 Homestake was informed, and in turn informed TVA, that

Uranex would not be permitted by the French government to perform the contract at the prices originally agreed upon. The Homestake-TVA contract was therefore renegotiated and deliveries were made. Subsequently, further negotiations made clear that France would no longer permit Uranex to deliver further uranium to Homestake at any price, and, in August of 1978, the TVA-Homestake contract was mutually terminated.

B. The Beginning of This Litigation

On November 18, 1977, TVA filed complaints seeking damages for injuries allegedly suffered on the three contracts entered in 1974 and from a purported boycott of the bid invitations issued in 1973. The complaints named as defendants three domestic and ten foreign companies, including Uranerz, Rio Algom, Uranex, Gulf and Gulf Canada.[7] TVA's complaints seek to impose liability upon defendants for acts done pursuant to foreign government direction. Thus TVA named an agent of the French government (Uranex) as a defendant; the cartel meetings TVA identified as illegal were attended and led by foreign government officials; and the prices TVA claimed to have been set by the cartel were minimum prices established by governmental directives (App. T). TVA now seeks to disguise its attack upon the foreign government cartel by protesting that it "does not challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its actions as they relate to the marketing arrangement." (TVA's May 8, 1980 memorandum in opposition to petitioners' motion for summary judgment at 17.) This claim, however, is disingenuous, as Canada has pointed out: "Notwithstanding these disclaimers, plaintiffs assert a right to relief which would directly conflict with Canadian laws and policies." (App. I 115a.)

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[7] *See* footnote 3 *supra*.

C. The Foreign Government Uranium Cartel

The cartel TVA attacks as violative of United States antitrust laws was, in fact, part of a more general regulation undertaken by uranium producing countries in response to actions of the United States.

After World War II, the United States, in urgent need of uranium for military purposes, requested its allies to develop their uranium resources. Canada, whose interests are most directly affected in petitioners' case, responded by building an entire industry, including the opening of mines and the creation of whole communities in remote wilderness areas. Eighty-five percent of Canadian uranium exports were shipped to the United States. In 1959, however, in order to protect a growing American uranium industry, the United States stopped purchasing foreign uranium and, subsequently, it effectively embargoed the domestic use of all foreign uranium. The resulting elimination of seventy percent of the free world market devastated the uranium industries of Canada, France, South Africa and Australia.

The uranium producing nations protested to the United States. Canada complained repeatedly that the embargo was a violation of the United States' obligations under the General Agreement on Tariffs and Trade. However, no corrective action was taken by the United States. By 1969, the Canadian uranium industry was operating at one-quarter of its 1959 production levels. Canadian jobs, communities and the industry itself were threatened with extinction. Other nations' uranium industries were similarly threatened.

In an effort to save its uranium industry, the Canadian government began a series of unsuccessful discussions with the governments of uranium consuming nations. Thereafter, Canada opened discussions with the three other uranium producing nations injured by the Ameri-

can embargo. These nations agreed to share the world uranium market (excluding only the United States and their own domestic markets) in order to stabilize prices and salvage their uranium industries. This marketing arrangement or governmental cartel lasted from 1972 to 1975. It was part of national regulatory programs which were comprehensive in scope. Indeed, wholly apart from the cartel, the foreign governments, including Canada, independently regulated, and continue to regulate, the price and other terms of sale of every pound of uranium exported, including exports to the United States.[8]

The relationship of the governments of Canada and the other foreign nations to the cartel has been made abundantly clear in official representations to the court below. (These representations are set forth in Appendices G through O. In addition, Appendix P contains a representative selection of diplomatic and other official statements made by Canada and the other foreign nations concerning their regulation of uranium, the governmental nature of their marketing collaboration or "cartel", and their resentment that American courts should inquire into and impose liability for acts performed outside the United States and required by foreign regulation.) Canadian government officials convened and led meetings of Canadian producers regarding the cartel, led Canadian delegations at the international meetings, and specifically implemented and required adherence to the terms of the cartel and the decisions reached at the meetings. Canada directed its government-owned corporations to join the cartel. As a matter of firm national policy, it secured the participation of private producers. It had a range of regulatory tools to secure this participation. Among such tools was the government's official power to

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[8] Because of the foreign governments' extensive regulatory control over their uranium industries, the approval of such governments will be required for tentative settlements announced on March 17, 1981, between certain of the foreign defendants and TVA.

deny export permits. Such permits are separately required for every export of uranium, and because of the small Canadian market for uranium, their denial would effectively put a company like Gulf Canada out of business. *Further, Canada stated to its private producers that prices and other terms set by the cartel would be enforced through government regulations, and thereafter promulgated such regulations.* Thus, the terms and conditions set by the cartel became the minimum terms and conditions required by the Canadian government.[9]

When American subpoenas sought production of foreign records relating to the cartel, all but one of the nations involved adopted laws or regulations forbidding the removal of these documents from their respective territories and prohibiting the disclosure of their contents. The remaining nation, France, issued orders which precluded production by Uranex. The foreign governments deeply resented having the validity of their regulation measured by American legal standards. Moreover, as Canada's Supreme Court has stated in refusing to enforce letters rogatory, the documents being sought reflect the input

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[9] Other foreign governments have been as explicit as Canada, in their representations to American courts. For example, the government of France stated:

> [A]t all times URANEX's participation in meetings of uranium producers was under instructions from appropriate French authorities. To attack URANEX's conduct is in fact to attack the conduct of the Government of France.
>
> * * *
>
> The activities of URANEX alleged by TVA to violate United States antitrust laws were, in fact, carried out subject to the direction, control and authorization of the CEA and other arms of the French Government.

Memorandum from the Government of France to the U.S. Department of State (October 27, 1978) filed in U.S. District Court, N.D. Illinois, June 8, 1979. (App. O 191a, 193a.)

of Canadian government officials, and Canada's sovereignty would be violated by production of the documents for inspection of its policies by U.S. courts.[10]

D. The Trial Court's Intrusion Into Foreign Affairs

Following the transfer of the TVA lawsuits to the court below, legal disputes concerning the court's authority in the area of foreign affairs led to rulings by the judge on the subjects of jurisdiction and discovery.

These disputes arose when TVA requested that the court issue orders demanding the production of foreign documents concerning the cartel. Gulf and Gulf Canada contended that entry and implementation of such orders would violate the act of state doctrine because the cartel and the non-disclosure law were regulatory instruments of the Canadian government and because Canada had enacted a criminal law making the documents unavailable. At the court's invitation, the Government of Canada filed *amicus curiae* briefs setting forth the evolution of the cartel, the role which the Canadian government played in its creation and implementation, and the reasons why Canada had enacted its non-disclosure law. Canada stated that since it was contrary to her sovereign prerogatives for foreign tribunals to question the legality of cartel actions taken in compliance with Canadian law,

> [t]he Canadian government promulgated the Regulations to serve a vital national interest, particularly the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies respecting a vital Canadian resource in the face of assertions of jurisdiction by non-Canadian tribunals. These regulations were not procured by members of the uranium industry, and they were not adopted to protect the commercial interests of those companies. [Footnote omitted.] (App. G 50a.)

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[10] *Gulf Oil Corp.* v. *Gulf Canada, Ltd.*, 111 DLR [3d] 74, 91 (Can. S. Ct. 1980) (App. U 290a-291a.)

The governments of France, Australia and South Africa made representations parallel to those of Canada. (App. O 191a-192a; App. J 128a-129a; App. L 155a-158a.)

Notwithstanding these protests, the district court ordered petitioners and other defendants to produce the Canadian and other foreign documents. The court rejected petitioners' act of state argument, claiming that it was not questioning any foreign law. (App. E 28a-29a.) The court refused to weigh the interests of foreign governments, and actually suggested that the foreign nondisclosure laws had been adopted by foreign governments in bad faith, to create a cover-up of antitrust violations: "[T]he information which plaintiffs seek is of such exceptional significance that the three foreign governments have sought to authorize defendants to withhold that information for the express purpose of frustrating United States judicial inquiries into the activities of this cartel." (App. E 41a.) The court ordered production of the Canadian documents though it conceded that "Canada has taken a completely inflexible position" against allowing such production. (App. E 43a.)

Subsequently, when a new Canadian administration took office, and Gulf requested a brief extension of time so that it could continue efforts to obtain a waiver of the Canadian nondisclosure law, the court expressed severe impatience with the Canadian government and its Prime Ministers:

> My friend, I want to tell you one thing: I am not going to change the scheduling of this case with the rise and fall of the Canadian Government or any other commonwealth government. We have stayed our hands. We have deferred to them. And we are not going to do it anymore.
>
> So from now on, if you want to make that argument, put it in writing, make it on the record, but don't take up my time with it.

> And you may transcribe these remarks and you may transmit them to the Government of Canada, Australia, Great Britain and South Africa.
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> * * * *
>
> I hope that [Prime Minister Pierre] Trudeau has more sense than [Prime Minister Joe] Clark, but I doubt it, because he was there before Clark.[11]

Thereafter, in a motion for summary judgment, Gulf and Gulf Canada argued that courts may not judge the legality of actions taken in foreign countries pursuant to governmental direction, and that the district court thus has no jurisdiction over allegations that the cartel fixed prices, established sales quotas, and controlled the terms of export.[12]

The court denied the motion for summary judgment in an oral ruling from the bench. The court totally ignored three official Canadian government briefs which detailed Canada's role in forming, operating and requiring adherence to the cartel, and which stated Canada's reasons for enacting its non-disclosure law.[13] The court asserted

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[11] Transcript of Proceedings, U.S. District Court for the Northern District of Illinois, March 26, 1980, at 11-12. (App. F 45a.)

[12] Though a court lacks jurisdiction under the act of state doctrine to inquire into the legality of these matters, a plaintiff may show the existence of foreign governmental regulation, including the cartel, as background and motivation for anticompetitive actions allegedly taken by Gulf and Gulf Canada in the United States. No foreign government required any such alleged acts, and TVA charges none, though plaintiffs in other uranium cases do. Gulf and Gulf Canada claim no immunity with respect to such charges, but rather wish to go to trial to disprove the charges in cases where they are made.

[13] Not only has the official position of foreign governments been ignored by the district court, but the Court of Appeals for the Seventh Circuit has actually rebuked the foreign governments for presenting their official positions. This occurred on an appeal of a default entered against foreign defendants who refused to submit to American jurisdiction. Referring to official briefs filed by foreign

that no act of state is involved in petitioners' case, but only the defense of sovereign compulsion. It said that the validity of this defense must be tried by a jury if supported by sufficient evidence, but, in the face of official briefs filed by Canada, which should be conclusive of the issue, the court suggested there might not even be enough evidence to go to the jury on the question.[14]

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted Because the District Court Is Taking Actions That Affect the Dignity and Rights of Friendly Sovereign Nations and Interfere With the Foreign Relations of the United States, and Is Doing So In Violation of Established Legal Principles Which Deprive It of Subject Matter Jurisdiction To Engage In Such Conduct.

This case is plainly appropriate for the issuance of an extraordinary writ by this Court. Without any jurisdiction whatever, the lower court has embarked upon, and

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governments, the Seventh Circuit said that "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction." *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1256 (7th Cir. 1980). This insulting comment, which was highly offensive to the foreign governments, caused the Executive Branch to send the appeals court a letter stating that the court's remark had caused "serious embarrassment to the United States in its relations with some of its closest allies." Letter from Roberts B. Owen, Legal Adviser, Department of State, to John H. Shenefield, Associate Attorney General, Department of Justice, sent to the Seventh Circuit by the Associate Attorney General at the Legal Adviser's request. (App. Q 245a; App. R.)

[14] In an *amicus curiae* brief filed in this Court in the related case of *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360, the Government of Canada has officially reiterated the positions it expressed to the court below regarding Canada's regulation of its uranium industry. It also officially reiterated that the exercise of jurisdiction over Canadian regulation by American courts has a deleterious impact on relations between the United States and Canada. The Canadian brief makes specific reference to the actions of respondent.

is in the process of carrying out, a course of action which is damaging American foreign relations, and which will continue to damage foreign relations unless the requested writ is granted. The court's rulings and actions also cast into doubt the critical principle, protected by the act of state doctrine, that foreign nations have authority to regulate their own industries, and that companies can comply with such regulation abroad without incurring liability in American courts.

Because of the harm being inflicted upon foreign relations, and the doubt cast upon a principle vital to international business affairs, there is an imperative need for an immediate, authoritative resolution of the legality of the lower court's actions.

1. That American foreign relations are being continually damaged by the proceedings below does not admit of doubt. Canada has explicitly stated to the court below that the actions of American courts are harming its relationships with the United States:

> It is unfortunate but nonetheless true that efforts of American tribunals to exercise jurisdiction over this subject matter have already had an adverse effect on Canadian-American relations. This situation is considered undesirable by both governments. However, the situation does in fact exist and the likelihood of exacerbation is another element against exercise of antitrust jurisdiction. (App. I 121a-122a.)

In a brief *amicus curiae* filed in the district court, Canada further said that American judicial inquiry into the legality of activities undertaken pursuant to the uranium marketing arrangement "would constitute an inappropriate and unwarranted intrusion into Canadian internal affairs," (App. I 118a) and that the "Government cannot accept a situation in which its ability to ensure compliance by the Canadian private sector with its laws and industrial policies would be undermined." (App. I 104a.)[15]

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[15] Canada left no doubt that the brief was an official representation: "This memorandum, and those previously filed in this pro-

France, which has stated that the judicial action sought by TVA "would constitute an unjustifiable invasion of French sovereignty," (App. O 196a) has also explicitly represented that "To attack URANEX's conduct is in fact to attack the conduct of the Government of France." (App. O 191a.) Australia and South Africa have made similar statements that the lower court's exercise of jurisdiction is an invasion of their sovereignty and is harming those nations' relationships with the United States. (App. K 138a-139a, 140a; App. M 168a-169a.)

This situation, and the fact that the district court has plainly exceeded the jurisdictional limits imposed by the act of state doctrine, discussed below, brings this case squarely within the standards for the grant of an extraordinary writ laid down in *Ex Parte Peru*, 318 U.S. 578 (1943). There, this Court issued a writ to take a case from the district court, thus granting an interlocutory appeal and bypassing the court of appeals. The litigation involved the Republic of Peru's claim of title to a ship, and this Court granted the writ because the "case involve[d] the dignity and rights of a friendly sovereign state. . . ." *Id.* at 586-87. The present case involves the dignity and rights of several friendly sovereign states, and because it challenges their authority to regulate their own economies, trespasses even more radically upon their sovereignty. The case for issuing the writ of mandamus is thus far stronger here than it was in *Ex Parte Peru.*

2. The controlling legal principle involved here—the act of state doctrine—is clear. It requires dismissal of those allegations which assume the illegality of the foreign government cartel by challenging that which the

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ceeding, represent the duly considered official position of the Government of Canada. The statements describing Canadian laws and policies and the factual background of such laws and policies were specifically approved and authorized at the Ministerial level of the Canadian Government." [Footnote omitted.] (App. I 104a.)

governments controlled—export prices, quotas and terms of sale. It will not do to claim, as the district court has here, that it does not question any regulation by Canada, when in fact it sits to judge the very behavior that Canada's regulation required. Such casuistry circumvents, while paying lip service to, the rule that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897).

This rule, affirmed in *Alfred Dunhill, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); and *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); denies jurisdiction to an American court when the actions it is asked to judge were required by a foreign nation acting within the legitimate sphere of its sovereignty. Canada, France, South Africa, and Australia acted well within the legitimate sphere of their sovereign powers when they engaged in pervasive, transaction-by-transaction regulation of their uranium industries and exports and when they collaborated in establishing and operating the foreign government uranium cartel. The absence of jurisdiction in the district court is so clear, therefore, that the issuance of a writ of mandamus is not merely appropriate but essential.[16]

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[16] The need for a writ is further increased because the district court's determination to judge foreign regulation under American antitrust law creates legal anomalies which cannot help but offend foreign nations. Under the doctrine of *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), regulation by a state of the union is immune from federal antitrust law when two conditions are met: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (citation omitted). Under this test, the conduct required by the foreign governments' regulation would be immune if required by a state. Yet the district court

3. The district court has retained jurisdiction only by violating another requirement of the act of state doctrine and by improvising a novel exception to its full force and effect.

A. Faced with comprehensive, unequivocal statements by foreign governments that they mandated the behavior challenged, the court chose not to accept or evaluate those representations, but to ignore them. This may not be done. The act of state doctrine requires that official representations by a foreign government concerning its own laws must be given conclusive effect by an American court, state or federal. The alternatives are either (1) to ignore such representations completely or (2) to admit them subject to contradiction at trial so that the credibility of the foreign government is put at issue. Neither of these alternatives is thinkable.

In the first place, to ignore or try the credibility of a foreign government's representations is to insult that government's dignity and rights and thus to interfere with the foreign relations of the United States. Secondly, either of these alternatives must often render the act of state doctrines meaningless. Regulatory actions are rarely reflected entirely in published rules. It will often

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proposes to judge the conduct when it was required by a foreign nation. Further the court proposes to do so even though United States regulation much less affirmative and less actively supervised than that of the foreign governments is immune from federal antitrust law. *See, Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); and *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

This situation, in which foreign governments' regulation is not shown the deference given to state or federal regulation, is insulting to the foreign governments. It also works inevitable injury to international business affairs because, so long as the situation exists, no foreign government, and no corporation subject to foreign laws, can know with certainty that compliance with those laws will not result in crippling liabilities being imposed by American courts.

be impossible, therefore, for a litigant to prove precisely what a foreign government did require except through that government's representations. In such cases, courts can avoid interference with foreign government regulation only by giving conclusive effect to the government's representations.

For these reasons, the act of state doctrine requires the court below to accept the representations of Canada, France, South Africa, and Australia as to what their laws and regulations required and what their regulators did.[17] When those representations are accepted as true, summary judgment must be granted.

B. Though the district court gave no reasons for asserting that there is no act of state here, its statements indicate that it was relying on a theory analogous to the so-called *Bernstein* exception to the act of state doctrine: *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). Though the "*Bernstein*" exception seems defunct after its rejection by six judges of this Court in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), it formerly permitted a federal court to exercise jurisdiction if advised by the Executive that there would be no interference with foreign affairs. The court below has never been so advised, but nonetheless decided that a private antitrust action was an appropriate means to "ventilate" the problem because the Department of Justice had brought a limited misdemeanor action which was settled by plea. The court said:

> The Government of the United States initiated a criminal prosecution in this matter.

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[17] It is for the same reasons that *Zschernig* v. *Miller*, 389 U.S. 429 (1968), precludes state court inquiries into the credibility of foreign governments' representations with respect to their own laws and policies. The principles of federalism which dictate that result are identical in this context to the principles of separation of powers which underlie the act of state doctrine.

> There are some who say that it was not very vigorous, but nonetheless it brought to bear on the economic-social factual situation the entire weight of the United States Government as plaintiff in an anti—or in a criminal antitrust action.
>
> When that criminal prosecution was initiated, and was disposed of, by, I assume, a negotiated plea —in fact, I know it was from what little I have heard about it—this action was pending.
>
> And I can only construe the handling of the criminal prosecution in part to mean that the Government of the United States, the Justice Department, the Antitrust Division of the Justice Department, was content that this problem be litigated, ventilated and adjudicated in this private action .
>
> And it's going to be. (App. A 4a.)

The court's determination to proceed without regard to the interests of foreign nations, however, is not supported by the action of the Executive Branch. Rather, it is contrary to the Executive's own conduct in limiting its enforcement action precisely because of concern for foreign governmental interests,[18] and to a letter to the lower court from the Department of Justice constituting "a formal statement of interest by the United States." (App. S 251a.) The Executive there declared, among other things, that the response of foreign governments to the lawsuit "testifies to the intensity and authenticity of their respective interests," and that their representations "are entitled to appropriate deference and weight in resolving legal questions that turn, at least in part, on considerations of international comity." (*Id.*)

Particularly in light of this communication, the Executive's narrow misdemeanor charge is not authorization

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[18] Hearings on Confirmation of John H. Shenefield, Nominee, Associate Attorney General, Before the Senate Committee on the Judiciary, 96th Cong., 1st & 2d Sess. 8-16, 70-78 (Dec. 7, 1979 and Jan. 24, 1980) (Testimony of Mr. Shenefield).

for the district court to disregard the foreign governments' interests and exceed by far the limits the United States government placed upon itself.

II. The Writ Should Be Granted Because Full and Adequate Relief Cannot Be Obtained Through Normal Appellate Channels.

No appellate route other than this petition for an extraordinary writ can achieve full and adequate relief. An affront to the dignity and rights of friendly sovereign states is occurring now. Damage to the foreign relations of the United States is being inflicted now. Uncertainty as to the sovereign powers of foreign nations to regulate is being created now. Each of these serious and wholly unnecessary harms will continue and become aggravated the longer the court below proceeds on its present course. The only expeditious and conclusive way of ending this situation is an authoritative resolution of the jurisdictional dispute by this Court now, rather than after trial and appeals or a petition for an extraordinary writ to the court of appeals. Moreover, approach to the Court at this time in this case is particularly appropriate since the same issue is presented to the Court, though with other potentially dispositive issues not present here, in *General Atomic Co.* v. *United Nuclear Corp.* No. 80-1360 (Oct. Term 1980).

We have shown above that this case falls squarely within the standards laid down in *Ex Parte Peru, supra,* for the grant of a writ of mandamus. The appropriateness and necessity of issuing the writ is additionally manifest under principles enunciated in *United States Alkali Export Association* v. *United States,* 325 U.S. 196 (1945); *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212 (1945); and *Ex Parte United States,* 287 U.S. 241 (1932). Those cases establish that an extraordinary writ will be granted when a question is of "grave public

importance," *De Beers*, 325 U.S. at 224, or of "such a nature that it is peculiarly appropriate that such action by this court should be taken," *Ex Parte United States*, 287 U.S. 249, or where a fundamental policy or function is being frustrated, *United States Alkali Export Association*, 325 U.S. at 204, or "when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power. . . ." *De Beers*, 325 U.S. at 217. These standards are more than met here.

CONCLUSION

For the foregoing reasons, a writ of mandamus should issue.

Respectfully submitted,

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SUBSIDIARY AND AFFILIATE APPENDIX

SUBSIDIARIES AND AFFILIATES OF PETITIONER GULF OIL CORPORATION

AB Djurgardesberg
Albert Rose Chemicals Ltd.
Alberta Products Pipe Line Ltd.
Alberta Underground Storage Ltd.
Allied-General Nuclear Services
American Heavy Lift Shipping Company
Andogas S.A.
Asia Polymer Corporation
A/S Jargul
A/S Jargul and Co. K/S
Autobahn-Rastataette Wuerenlos AG
Aviation Fueling Services S.A.

Balinesian Gulf Oil Ltd.
Beufort-Delta Oil Project Ltd.
Bio Research Center Co., Ltd.
Britama Tankers Limited

Cabinda Gulf Oil Company
Canada Systems Group (EST) Limited
Cansulex Limited
Carboquimica, S.A.
Carnduff Gas Limited
China Gulf Oil Company, Ltd.
China Gulf Plastics Corporation
Chinhae Chemical Company Ltd.
Colonial Pipeline Company
Compania Petrolera Aguarico S.A.
Compagnie D'Investments Pour Les Combustibles
De Reacteurs a Haute Temp
Condor Industria Quimica, S.A.
Coser S.A.

Delaware Bay Transportation Co.
Dixie Pipeline Company

Eastern Venezuela Gas Transport Company
Ethylene Pijpleiding Maatschappij (Belgium) N.V.
Ethylene Pijpleiding Maatschappij (Nederland) B.V.
Explorer Pipeline Company

Gaelic Oil Co. Ltd.
G & C Realty Limited
General Atomic Company
General Atomic Europe—G.m.b.H.—Zurich
Glen Park Gas Pipe Line Company Ltd.
Gulf Canada, Ltd.
Gulf-Dravo Systems Corporation
Gulf Ecuatoriana de Petroleo, S.A.
Gulf Oil A/S
Gulf Oil Egypt, Ltd.
Gulf Oil (Ireland) Ltd.
Gulf Oil (Luxembourg) S.A.
Gulf Oil Pakistan Ltd.
Gulf Oil Refining Ltd.
Gulf Oil (Switzerland)
Gulf Oil Terminals (Ireland) Ltd.
Gulf Oil Trading Investments Limited
Gulf Oil Zaire S.a.R.L.
Gulf Oman Petroleum Ltd.
Gulf-Preload Structures Inc.

Harshaw Cabo & Cia, S.A.
Harshaw Chimie S.a.R.L.
Harshaw Galvanotecnia S.A.
Harshaw-Juarez S.A. de C.V.
Harshaw-Murata Kabushiki Kaisha
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau G.m.b.H.
Hutchinson Island Limited Partnership
Hydrant Servicing Company Ltd.

Ico Pinturas, S.A.
Industrias Vencedor S.A.
Interprovincial Pipe Line Ltd.
Interquimica S.A.
INSCO Holding and Finance Company N.V.
INSCO Limited
Iranian Oil Participants Ltd.

Java Gulf Ltd.

Keydril Ltd.
Keydril (Nigeria) Ltd.
Key International Drilling Co. Limited
Key Perfuracoes Maritimas, Ltd.
Korea Oil Corporation
Kupan Emirates Company Ltd.
Kupan Financial Company (Rotterdam) B.V.—
Minerals Branch

Laurel Pipe Line Company
London Oil Refining Company Limited

Mainline Pipelines Ltd.
Mid-Atlantic Chemical Corp. S.A.
Mid-Valley Pipeline Company
Midwest Carbide Corporation
Millmaster Onyx (Canada) Ltd.
Millmaster Onyx G.m.b.H.
Montreal Pipe Line Company Limited
Mozambique Gulf Oil Company

Northward Developments Ltd.
Nottingham Gas Ltd.

Oil Shippers Service, Inc.
Okinawa Sekiyu Seisei Company, Ltd.
Okinawa Terminals Co., Ltd.
Oklahoma Nitrogen Company

Paloma Pipe Line Company
Panindustrial, S.A.
Peace Pipe Line, Ltd.
Pembroke Capital Company
Pembroke Craking Company
Permapint, S.A.
Petrogas Processing, Ltd.
Petromont Inc.
Plastigama, S.A.
Platte Pipe Line Company
Polyquimicos, S.A.
Produtos Quimicos Somox, Ltda.
Project Baltic

Raffinerie de Cressier S.A.
Redwater Water Disposal Company Ltd.
Resinas Andinas S.A.
Rimbey Pipe Line Co., Limited
Rio Blanco Oil Shale Partnership

Sarni S.p.A.
Silvertown Lubricants Limited
Sociedad Anonima Espanola de Lubrificantes
Societe de Combustible Pour Reacteurs a Haute Temp.
Spencer Quimica Mexicana S.A. de C.V.
Sultran Ltd.
Sulzer General Atomic Waermetauscher
Sunrise International Co. Ltd.
Svenska Petroleum
Syncrude Canada Ltd.

Taita Chemical Corporation
Taiwan Chemical Corporation
Taiwan VCM Industries Corporation
Trans Mountain Pipe Line Company
Trans Northern Pipe Line Company
Transwestern Pipeline Company

Venezuela Gulf Refining Company

West Texas Gulf Pipe Line Company
Western G.M.C. Pontiac Buick Ltd.

CONSTITUTIONAL AND STATUTORY APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. COMMERCE CLAUSE

Article I, Section 8, Clause 3 of the United States Constitution provides in pertinent part:

> The Congress shall have Power . . . [t]o regulate commerce with foreign Nations, and among the several States . . . .

B. TREATY AND APPOINTMENT POWER

Article II, Section 2, Clause 2 of the United States Constitution provides in pertinent part:

> [The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . .

C. CANADIAN URANIUM INFORMATION SECURITY REGULATIONS

Section 3, SOR/76-644, as amended by SOR/77-836, promulgated pursuant to Section 9 of the Atomic Energy Control Act, R.S.C. 1970, c. A-19 provides:

> 3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside Canada of uranium or its derivatives or compounds shall
>
> (a) release any such note, document or material or disclose or communicate the contents

thereof to any person, foreign government or branch or agency thereof or to any foreign tribunal unless

(i) he is required to do so by or under a law of Canada, or

(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.